

THE STATE OF NEW HAMPSHIRE

ATTORNEY GENERAL
GREGORY H. SMITH

DEPUTY ATTORNEY GENERAL
PETER W. MOSSEAU

ASSISTANT ATTORNEYS GENERAL
JOHN T. PAPPAS
MARC R. SCHEER
DONALD J. PERRAULT
MARTIN R. JENKINS
~~BETSY S. WESTGATE~~
~~EDWARD L. CROSS JR.~~
PETER C. SCOTT
~~MICHAEL A. PIGNATELLI~~
BRIAN T. TUCKER
PAUL BARBADORO
BRUCE E. MOHL
JOHN A. MALMBERG
DOUGLAS L. PATCH
LORETTA S. PLATT
ROBERT P. CHENEY, JR.



THE ATTORNEY GENERAL
STATE HOUSE ANNEX
25 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

ASSISTANT ATTORNEYS GENERAL
LESLIE J. LUTKE
ANDREW L. ISAAC
RONALD F. RODGERS
G. DANA BISBEE
PETER T. FOLEY
STEVEN M. HOURAN
JEFFREY R. HOWARD
EVE H. OYER
GREGORY W. SWOPE
JAMES D. CAHILL, III
CHARLES W. GRAU
DANIEL J. MULLEN
T. DAVID FLOURDE

ATTORNEYS
EDNA M. CONWAY
AMY L. IGNATIUS
ROBERT B. MUH
DAVID K. MULHERN
JAMES A. SWEENEY

July 16, 1984

Brian C. Strohm, Ph.D.
Assistant Director
Division of Public Health Services
Hazen Drive
Concord, NH 03301

Re: Validity of Hazardous Waste Rules Adopted Prior to the
Effective Date of RSA 147-A, June 23, 1981.

Dear Mr. Strohm:

This letter is in response to your memorandum of March 24, 1983, and subsequent discussions with this office regarding whether or not State administrative rules pertaining to hazardous wastes which were adopted under RSA 147:48-57 (Supp. 1979) remain effective without formal readoption in light of the repeal of RSA 147:48-57 and its amendment and re-enactment as RSA ch. 144-A (Supp. 1981).

Our conclusion is that the original hazardous waste rules adopted pursuant to RSA 147:48-57 (Supp. 1979) have remained continuously in effect and therefore readoption under RSA ch. 147-A is unnecessary. This letter confirms our previous discussions regarding this matter.

Discussion

By way of background, in 1979 the New Hampshire legislature enacted RSA 147:48-57 (Supp. 1979) [Ch. 347, Laws of 1979; Effective July 1, 1979], to comprehensively regulate the generation, treatment, storage and disposal of hazardous wastes in this State. Chapter 347 established the Bureau of Solid Waste Management and imbued it with the authority to issue permits; to generally regulate the generation, treatment, storage and disposal of hazardous wastes; and to adopt rules.



Brian C. Strohm, Ph.D.
Page 2
July 16, 1984

Following this grant of rulemaking authority, the Bureau developed a comprehensive set of rules pertaining to hazardous waste management. These rules were adopted pursuant to RSA 541-A, the State Administrative Procedures Act, and became effective on June 3, 1981.

Just after the newly-adopted rules became effective, the legislature repealed RSA 147:48-57 and essentially re-enacted it as RSA ch. 147-A [Ch. 413, Laws of 1981] which took effect on June 23, 1981. With regard to its rulemaking powers, the existing authority of the Bureau as established under RSA 147:50 was re-enacted as RSA 147-A:3 in substantially the same form, though the scope of that power was expanded somewhat.

Since the enactment of RSA 147-A, the Bureau has adopted new rules or amended its original rules on July 15, 1981; October 18, 1981; November 19, 1981; June 18, 1981; and August 3, 1982. These amendments and additions were consolidated with the original rules and a second edition of the Hazardous Waste Rules was published on November 30, 1982. Since then, the second edition of the rules has been further amended by additional rulemaking.

As stated earlier, the question raised by the above-described legislative action is whether the original hazardous waste rules, which became effective on June 3, 1981, were rendered null and void by the repeal of RSA 147:48-57 on June 23, 1981, such that they must be re-adopted under RSA 147-A:3 to be considered in effect and legally binding.

It is a well established principle of law that where a statute is repealed by a new statute which relates to the same subject matter, and which re-enacts substantially the provisions of the earlier statute, and the repeal and re-enactment occur simultaneously, the provision of the original statute which are re-enacted in the new statute are not interrupted in their operation. They are regarded as having been continuously in force from the date they were originally enacted. State ex rel. Iowa Air Pollution Control Commission v. City of Winterset, 219 N.W. 2d 549, 551 (Iowa 1974); citing 73 Am. Jur. 2d Statutes, §391, at 509, accord, Hensley v. Bethesda Sheet Metal Co., 230 Md. 556, 188 A.2d 290, 292 (1963); Allied Veterans Council v. Klamator County, 23 Or. App. 748, 544 P.2d 190, 194 (1975); see also State v. Wimpfheimer, 69 N.H. 166, 171 38 A.786 (1897).

Brian C. Strohm, Ph.D.

Page 3

July 16, 1984

In other words, the effect of the repeal of a statute and its re-enactment at the same time, in substantially the same words, is to continue the statute in uninterrupted operation. City of Mequon v. Lakes Estates Company, 52 WIS. 2d 765, 190 N.W. 2d 912, 915 (1971); State v. Wimpfheimer, 69 N.H. at 171.

In the case at hand, the New Hampshire legislature undertook a rearrangement and reformation of existing statutes pertaining to hazardous waste in 1981. Prior to the 1981 legislative session, state solid and hazardous waste laws were both located in RSA ch. 147. While amending both solid and hazardous waste laws in 1981, the legislature reorganized the laws by repealing all of the solid and hazardous waste laws in RSA 147 and by re-enacting the solid waste laws as RSA ch. 147-L (Supp. 1981) and the hazardous waste laws as RSA ch. 147-A (Supp. 1981). Both re-enactments retained much of the existing law in each field.

With regard to the Bureau's authority to adopt rules relating to hazardous wastes, the legislature essentially recodified that authority, in substantially the same form, from RSA 147:50 to RSA 147-A:3 (Supp. 1981). Based on the above discussion of case law, it is our opinion that the authority of the Bureau to adopt rules remained in uninterrupted operation.

In addition, it is our opinion that the rules adopted pursuant to this authority also remained in uninterrupted operation. It has been long settled in New Hampshire law that the repeal of laws by which an agency or other body has been authorized to pass bylaws, with a simultaneous re-enactment of all of those laws, indicates no intention on the part of the legislature to disturb "all that had been done, and all that then existed under them." Lisbon v. Clark, 118 N.H. 234, 244 (1846). The U.S. Court of Appeals stated that the statute, or part thereof, substituted by a simultaneous repeal and re-enactment of substantially the same statute, is construed as a continuation of the original provisions to the extent re-enacted "and the jurisdiction of the agency is not disturbed as to those provisions which were continued under the new statutes". The Pentheny, Ltd. v. Government of the Virgin Islands, 360 F.2d 786, 790 (3rd Cir. 1966). In other words, the authority to adopt rules by an agency remains uninterrupted and therefore the rules adopted pursuant to this authority also remain in effect uninterrupted.

In the case at hand, it is our opinion that the hazardous waste rules adopted by the Bureau pursuant to the authority granted to the Bureau by the original hazardous waste statute,

Brian C. Strohm, Ph.D.
Page 4
July 16, 1984

remained in uninterrupted effect after the repeal and re-enactment of those statutes.

Because of the simultaneous repeal and re-enactment of the Bureau's rulemaking powers without substantial changes to the original authority granted to the Bureau under RSA 147:50, that authority and the rules of June 3, 1981, adopted pursuant thereto, should be deemed not to have been repealed, but rather to have remained continuously in effect. Consequently, any rules adopted under that original authority need not be readopted under RSA 147-A.

If you should have any further questions, please let me know.

Very truly yours,



Robert P. Cheney, Jr.
Assistant Attorney General
Environmental Protection Division

RPC/mlw

83-45-I